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Opinion No. 04-131

Impact of *Blakely v. Washington* on Tennessee's Sentencing Scheme

QUESTION

In light of *Blakely v. Washington*, does Tennessee's sentencing scheme, Tenn. Code Ann. §40-35-101, *et seq.*, violate a defendant's Sixth Amendment right to trial by jury as applied to the States via the Due Process Clause of the Fourteenth Amendment?

OPINION

Yes, in part. Those portions of Tenn. Code Ann. §40-35-101, *et seq.*, that allow a trial court to enhance a defendant's sentence above the presumptive minimum through application of enhancement factors--other than the fact of a prior conviction or any factor admitted by the defendant--are constitutionally invalid. However, as more fully explained below, significant features of Tennessee's sentencing scheme remain unaffected by *Blakely*.

ANALYSIS

In *Blakely v. Washington*, 542 U.S. ___, 124 S.Ct. 2531 (2004),* the United States Supreme Court applied the rule expressed in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to reverse the judgment of Washington's intermediate appellate court. That court had affirmed the imposition of a "departure" sentence for Blakely under Washington's sentencing scheme based on the trial court's finding that Blakely had committed his offense with "deliberate cruelty."

Blakely pled guilty to a reduced charge of second degree kidnapping, a Class B felony, for the violent and brutal kidnapping of his wife. *Blakely*, 124 S.Ct. at 2535. Under Washington's sentencing scheme, a Class B felony carries a maximum confinement period of ten years. *Id.* Blakely, as a standard offender, faced a sentence between 49 and 53 months. But, Washington's

*On August 2, 2004, the United States Supreme Court granted certiorari in two federal sentencing guideline cases--*United States v. Booker*, ___F.3d ___, 2004 WL 1535858 (7th Cir. 2004), cert. granted, ___U.S. ___, 2004 WL 1713654 (2004) (No. 04-104), and *Fanfan v. United States*, 2004 WL 1723114 (D. Me. 2004), cert. granted, ___U.S. ___, 2004 WL 1713655 (2004) (No. 04-105)--both addressing *Blakely*'s impact on the federal sentencing guidelines. The court set an expedited briefing schedule and set oral argument for Monday, October 4, 2004.

statute also provided a trial judge the discretion to sentence above the standard range if the court found “substantial and compelling reasons justifying an exceptional sentence;” the statute then gave a non-exhaustive list of factors upon which a departure sentence could be based. After hearing Mrs. Blakely’s testimony at the sentencing hearing, Blakely’s judge utilized one of the statutory departure factors--finding that Blakely treated his victim with exceptional cruelty--to impose a departure sentence of 90 months.

In reversing Blakely’s sentence, the United States Supreme Court applied the rule expressed in *Apprendi v. New Jersey* that, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” The *Apprendi* rule emanates from the Sixth Amendment’s guarantee of the right to trial by jury, made applicable to the States through the Due Process Clause of the Fourteenth Amendment. *Apprendi v. New Jersey*, 530 U.S. 466, 476-477 (2000). Washington’s prosecutors argued that *Apprendi*’s rule had not been violated because the relevant statutory maximum was ten years, the maximum confinement period for a Class B felony. The Supreme Court rejected that argument and concluded that the statutory maximum for Sixth Amendment purposes was not the maximum sentence a judge could impose after finding additional facts, but the maximum a judge could impose without any additional findings. *Blakely*, 124 S.Ct. at 2537. The Court relied on its previous cases to make clear that the “statutory maximum” for Sixth Amendment purposes is “the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” *Id.* (emphasis supplied). Thus, Blakely’s 90-month departure sentence violated the Sixth Amendment, because it exceeded the maximum (48 to 53 months) that the Washington statute authorized based solely on the facts reflected in the jury’s verdict of guilt.

While Tennessee’s sentencing scheme differs in certain respects from the Washington guideline sentencing scheme at issue in *Blakely*, the differences do not appear to be constitutionally significant. Under Washington’s scheme, rather than providing a presumptive sentence, the legislature provided a range of sentences for each class of offense; the trial judge was free to impose any sentence within that range. A trial judge also had the authority to depart from that range and to impose a sentence up to the statutory maximum for the class of offense if the court found appropriate reasons justifying an exceptional sentence. Like Washington’s legislature, the Tennessee General Assembly has set out ranges of sentencing for each of five classifications of felony offenses; the ranges are based on prior criminal convictions. *See* Tenn. Code Ann. §§40-35-105 through 112. Tenn. Code Ann. §40-35-110(c) provides the presumptive minimum sentence for each class of offense. A Tennessee judge is never authorized to impose a sentence above the maximum sentence provided for the defendant’s class of offense and sentencing range. It was this lack of authority to impose a “departure” sentence that had previously led the Tennessee Supreme Court to conclude that Tennessee’s sentencing scheme did not violate the rule expressed in *Apprendi*. *See Graham v. State*, 90 S.W.3d 687,692 (Tenn. 2002) (because petitioner received a sentence within the statutory range for each offense, the trial court was within its constitutional authority to consider enhancing factors without the assistance of the jury; *Apprendi* provides petitioner no relief). But *Blakely v. Washington*, by clarifying the definition of “statutory maximum,” makes clear that the portions of

Tennessee's sentencing scheme that allow a trial judge to enhance a defendant's sentence above the presumptive starting point--the only sentence authorized by the jury's verdict standing alone--are constitutionally invalid unless the enhancement is based on prior convictions or on factors admitted by the defendant.

Tennessee Provisions Affected by *Blakely*

The only portions of Tenn. Code Ann. §40-35-101, *et seq.*, that are constitutionally invalid under *Blakely v. Washington* are Tenn. Code Ann. §40-35-210(d) and (e)--the provisions that require a trial judge to begin with the presumptive sentence and then authorize the judge to increase the sentence based on enhancement factors. Since, under Tennessee's statute, the only sentence that a trial judge may impose based solely on the jury's verdict is the presumptive sentence, until the legislature amends Title 40, a trial judge may not impose any sentence above the presumptive sentence unless the defendant has previous convictions beyond those necessary to establish the sentencing range, or unless the defendant admits to the presence of any other statutory enhancement factor.

Tennessee Provisions Not Affected by *Blakely*

Those portions of Tennessee's sentencing statutes setting out the sentence ranges for each classification of felony offenses, Tenn. Code Ann. §§40-35-105 through 109, are not affected by *Blakely* because the ranges are based on prior criminal convictions, which are specifically exempted from the rule in *Apprendi* and *Blakely*. Similarly, sentencing a defendant as a repeat violent offender is also based solely on a finding of prior criminal convictions and thus is not affected by *Blakely*. Tenn. Code Ann. §40-35-120. Furthermore, the trial court must make the repeat violent offender finding beyond a reasonable doubt. *Id.*

Several provisions of Tennessee's sentencing statute already involve the jury in sentencing decisions and thus meet *Blakely*'s requirements. Under Art. VI, §14, of the Tennessee Constitution, in any case where the range of punishment involves a fine in excess of \$50.00, the jury finding the defendant guilty of the offense also fixes the amount of the fine; the judge then imposes a fine not to exceed the amount set by the jury. Tenn. Code Ann. §40-35-301.

Tennessee Code Ann. §40-35-121 provides for enhanced sentencing where the defendant is a gang member, is a gang leader, or is being initiated into a gang by committing the offense. Enhanced sentencing pursuant to this statute requires notice to the defendant in a separate count of the indictment and requires a finding by the jury, in a bifurcated proceeding, that the defendant meets the statutory definition of a gang member prior to imposition of the enhanced sentence. While the statute is silent as to the applicable burden of proof, so long as a jury is instructed that it must make the factual findings of gang membership beyond a reasonable doubt, this enhanced sentencing provision clearly meets *Blakely* standards.

Similarly, Tenn. Code Ann. §40-35-203(e) meets *Blakely*'s requirements. According to its provisions, if the criminal offense provides enhanced punishment for second or subsequent offenses, the defendant is to be notified of such enhanced charge in a separate count of the indictment. Upon a finding of guilt of the underlying offense, the jury, in a bifurcated hearing, then must find beyond a reasonable doubt that the defendant has been convicted the requisite number of times before enhanced sentencing is proper.

Tennessee's misdemeanor sentencing provision, Tenn. Code Ann. §40-35-302, is not affected by *Blakely* because the statute simply requires the trial judge to impose the sentence within the appropriate range. While a trial judge may take enhancing and mitigating factors into account in setting the sentence, the judge is not required to do so. Thus, for a misdemeanor offense, the jury's verdict of guilt, standing alone, authorizes any sentence up to the statutory maximum.

While not a part of the Tennessee Sentencing Reform Act of 1989 and thus not specifically included within the request, this Office would also note that sentencing a defendant to community corrections pursuant to Tenn. Code Ann. §40-36-106 is also not implicated by *Blakely*. Tennessee Code Ann. §40-36-106(e)(2) provides a trial court with authority, in sentencing an eligible defendant to any community-based alternative to incarceration, to set the duration of the sentence at any period of time up to the maximum sentence within the appropriate sentencing range. Thus, just as in the misdemeanor sentencing context, upon a guilty verdict alone, a trial court has authority to sentence a defendant up to the statutory maximum for community-based alternatives to incarceration.

Finally, it is the opinion of this Office that consecutive sentencing pursuant to Tenn. Code Ann. §40-35-115 is not affected by *Blakely*'s holding. Tennessee law makes a distinction between imposition of sentence and manner of service of sentence. *See, e.g.*, Tenn. Code Ann. §40-35-205(d) (statute lists both length of sentence and manner of service of sentence as two distinct portions of a sentencing decision upon which prosecution and defense might reach plea agreement). In our view, the rule of *Apprendi* and *Blakely* applies only to imposition of the sentence and not to the manner in which the sentence is served. While the imposition of consecutive sentences, in practice, lengthens the actual amount of time a defendant serves, it does not increase the punishment for any individual offense. At least one appellate court, post-*Blakely*, has reached this same conclusion.

In *People v. Sykes*, 2004 WL 1682060 (Cal. App. 2 Dist. 2004), the California intermediate appellate court held that neither *Blakely* nor *Apprendi* purported to create a jury trial right for purposes of determining whether sentences should be served concurrently or consecutively. The court noted that the intent of both *Apprendi* and *Blakely* was to vindicate a defendant's Sixth Amendment right to trial by jury. In *Apprendi v. New Jersey*, 530 U.S. 466, 483-484 (2000), Justice Stevens explained that, while trial practices can change over the course of time and yet remain true to the Framers' intent, trial practices must, at a minimum, adhere to the basic principles undergirding the requirement of trying to a jury all facts necessary to constitute a statutory offense, and requiring those facts to be proven beyond a reasonable doubt. A determination as to whether multiple sentences should be served concurrently or consecutively does not involve "facts necessary to constitute a statutory offense." *People v. Sykes*, 1682060 WL at *8. In fact, a consecutive

sentencing decision can only be made after a defendant has already either pled guilty or been found guilty of each offense by a jury beyond a reasonable doubt. *Id.* Thus, a defendant's due process and jury trial rights have already been vindicated for each offense before a consecutive sentencing decision is even possible. *Id.*

Tennessee Appellate Courts

While the Tennessee Supreme Court has not yet had an opportunity to address *Blakely's* impact on Tennessee's sentencing scheme, the court has granted an application for permission to appeal pursuant to Tenn. R. App. P. 11 in *State v. Stephen L. Denton*, McMinn County, Supreme Court No. E2000-02615-SC-R11-CD, which raises *Blakely* issues. The case is currently being briefed and is scheduled for argument before the Supreme Court in Knoxville in September 2004. The Court of Criminal Appeals has had several opportunities to address *Blakely* and has concluded that *Blakely*, at a minimum, calls into question the continued validity of a trial judge's use of any enhancement factors--other than the fact of a prior conviction or an enhancement factor admitted by the defendant--to impose any sentence beyond the presumptive sentence. For example, in *State v. Stinson*, No. E2003-01720-CCA-R3-CD (Tenn. Crim. App. 2004), the Court of Criminal Appeals modified sentences of 24 years each for three rape-of-a-child convictions to 21 years each. The trial court had applied six enhancement factors to each conviction. The Court of Criminal Appeals found three of those factors inappropriate based on either insufficient evidence or legal inapplicability. As to the remaining three factors, the court found that *Blakely v. Washington* prohibited application of Tenn. Code Ann. §40-35-114(12) because it required a finding that the offense involved the threat of death or bodily injury to another person, and a finding that the defendant had previously been convicted of a felony that resulted in death or bodily injury. But the court found that application of the prior conviction enhancement factor was proper under the specific exception for prior convictions in both *Apprendi* and *Blakely*. Finally, the court held that application of a factor conceded applicable by the defendant on appeal was harmless beyond a reasonable doubt. *State v. Stinson, supra*, slip op. at p. 8.

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